

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

BLANCHE RENEE HAYWARD,

Defendant-Appellant.

UNPUBLISHED

June 20, 2013

No. 309550

Ingham Circuit Court

LC No. 11-000047-FC

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. She was sentenced to 10 to 20 years in prison for the armed robbery conviction and 47 months to 180 months for the assault conviction. Defendant appeals by right. For the reasons set forth below, we affirm.

I. BASIC FACTS

On the day of the assault and robbery, the complainant picked up his prescriptions for Vicodin. He claimed that later that night, defendant came to his apartment and he refused to sell her some Vicodin. He said that when he turned to get defendant a cigarette, she grabbed his Vicodin off the table. When he demanded that defendant return his pills she left very angry. The complainant testified that she returned approximately thirty minutes later, approached without saying anything, hit him in the head with a glass bottle, and knocked him unconscious. When he awakened, his rent money and Vicodin pills were gone.

Defendant claimed that she and the complainant regularly smoked crack cocaine and drank together, and that the complainant approached her about selling his Vicodin. She said she went to the complainant's apartment with "D," a neighborhood drug dealer, where D and the complainant began negotiating a deal. Defendant said she turned to leave when the deal was completed she later heard a "hit," turned around and found the complainant lying on the ground. She denied ever hitting him or stealing his pills.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that she was denied a fair trial by three unpreserved instances of prosecutorial misconduct. Where a defendant fails to preserve an issue of prosecutorial misconduct, our review is for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Accordingly, to avoid forfeiting the issues, defendant bears the burden to show “three requirements . . . : 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, an error “affect[s] substantial rights” if it “affected the outcome of the lower court proceedings.” *Id.* In the instant case, we detect no plain error for any of the instances complained of by defendant.

Both the lower court and the prosecutor have a duty to ensure that the defendant receives a fair trial. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). As such, the lower court must limit closing arguments to “relevant and material matters.” *Id.* Similarly, the prosecution cannot argue facts not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecution may utilize emotional language and is not limited to bland argumentative presentation. *Ullah*, 216 Mich App at 678. Further, prosecutors “are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

A. THE PROSECUTOR DID NOT INJECT IMPROPER OPINIONS.

During trial, a detective testified that when he was assigned to the case, defendant had already been named as the accused. He recounted what defendant told police after she was arrested:

Basically she indicated that she was in the apartment. She observed [the complainant] with his pills. And an altercation occurred in the apartment where she ended up fleeing from the apartment, and gave me another person who might have been involved.

* * *

All she could give me was D. Somebody that she had dealt with in the past to get drugs, stuff like that. . . .

The detective then explained the course of his investigation regarding D:

[T]he day she was arrested, I had contacted a couple of the other witnesses because they still lived in the neighborhood when we went to make the arrest. And a manager of the apartment complex, I don't remember what her name was right now. But it's a female. I asked her if she knew anybody in the neighborhood with the initials D. You know, it's one of those things that most of our dope dealers go by the initial D and different initials.... And she had been in the neighborhood for quite a while. . . . I didn't find out who D was because nobody knows who D is. . . .

The prosecution then asked the detective whether he conducted any additional investigation regarding D:

Q. And so did you believe that the investigation that you did regarding this case in regards to speaking to additional witnesses completed your investigation?

A. Yes, it did.

Q. And, Detective, is there generally additional or other type of follow-up that a detective would do when there is a named accused in a crime?

A. If I had a named accused, then there would be.

Q. But in this case you had a named accused, correct, that being the defendant?

A. I had [defendant]. No it would not, with the named accused. Like I said, the witnesses identified [defendant] coming out of the house, and the victim identified [defendant] as coming out of the house.

In closing, the prosecution argued that the police investigation was adequate:

Clearly when police respond to a scene it's often very obvious what crimes were committed, and the investigation is done by the police so that they can determine who is responsible for committing those crimes. I submit to you that in this case, the investigation had determined the assailant in this case was in fact, the defendant. That was done in this case.

As the Detective [] testified, this was not a case in which the police were trying to identify an unknown assailant who assaulted and robbed [the complainant]. The police knew exactly who did that. [The complainant] had told the police that it was [defendant] who hit him in the head with a bottle and robbed him of his medications.

Defendant argues that the prosecutor's line of questioning and closing argument offered impermissible opinions that defendant must be guilty because D was eliminated as a suspect. We disagree. It is undisputed that defendant's theory of the case was that D assaulted and robbed the complainant, and that police failed to properly investigate the crime. As such, it was relevant and reasonable for the prosecution to question the detective about his investigation. The prosecutor did not ask the detective whether he believed the complainant or defendant. Rather, the prosecutor asked whether the detective was satisfied that he had completed his investigation despite failing to locate D with the defendant named as the perpetrator by the complainant. Additionally he made inquiry regarding the detective's habit, practice, and routine under similar circumstances.

Similarly, the prosecutor did not inject improper opinion into the closing argument. As noted earlier, prosecutors are generally free to argue "all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. Defendant argued that the crime was perpetrated by D, and that the police did not conduct a thorough investigation. The

complainant specifically testified that defendant struck him in the head with a bottle, and the detective testified that he was unable to locate the supposed assailant D. It was reasonable for the prosecutor to argue that defendant committed the crime, and that the police completed the investigation. In any event, the lower court specifically instructed the jury not to consider the prosecutor's arguments as evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

B. THE PROSECUTOR DID NOT IMPROPERLY VOUCH FOR THE COMPLAINANT'S TRUTHFULNESS.

In closing argument, the prosecutor commented on the credibility of the complainant's testimony and defendant's testimony, stating:

I submit to you that [the complainant] was clearly emotional when he took the stand because of the vicious assault and serious injuries that he sustained at the hands of the defendant.

I also submit to you that [the complainant] was truthful in his statements to you. [He] has absolutely no reason whatsoever to lie on the defendant.

* * *

I submit to you that the defendant and [defendant's husband] are the only two people who had a reason to lie in this case, and that they did in fact lie to you. . . .

* * *

Clearly the defendant wanted Vicodin. She was an addict. She needed a fix. And by any means necessary she was going to do what she needed to do to get more drugs. . . .

* * *

[The complainant] told you the truth of what happened on October 19th, 2010 at his residence. [He] was telling you the truth when he told you that it was [defendant], the defendant who robbed and assaulted him.

Defendant contends that these statements constitute impermissible vouching. We disagree. Generally, a prosecutor may argue that a witness is credible, so long as he or she relies on facts in evidence. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). In addition, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The outcome of this case depended on whether the jury believed the complainant or the conflicting testimony of defendant. As such, the prosecutor was entitled to argue that the jury should believe the complainant because he had no reason to lie.

C. THE PROSECUTOR DID NOT DENIGRATE DEFENDANT BY CALLING HER A
“MONSTER.”

In closing, defense counsel compared the complainant to the Sesame Street character “Cookie Monster.” Like the Cookie Monster, defense counsel explained, he told several different versions of what happened on the night of the incident. Counsel posited he did so because of a significant drug addiction and the need to pay for the drugs by selling the Vicodin and spending the rent money. In rebuttal, the prosecutor explained that the complainant’s statements were inconsistent due to his fear and his injuries. As to the Cookie Monster analogy, the prosecutor stated:

This case has nothing to do with the Cookie Monster or cookies. This is real life. And [the complainant] almost lost his life. He had a serious head injury that was sustained by the actions of the defendant. The only monster in this case is the Defendant

Defendant contends that the prosecutor improperly denigrated her by calling her a “monster.” Again, we disagree. The prosecution may utilize emotional language and is not limited to bland argumentative presentation. *Ullah*, 216 Mich App at 678. Here, the prosecutor’s comments characterized the nature of defendant’s crime, and were directly responsive to defense counsel’s closing argument. And, of course, it is presumed that the jury followed the lower court’s instruction not to consider the prosecutor’s closing argument as evidence. See *Abraham*, 256 Mich App 279.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that she was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor’s repeated acts of misconduct. We disagree.

Generally, counsel “is not ineffective for failing to advocate a meritless position.” *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). In the instant case, defendant was not denied a fair trial as a result of prosecutorial misconduct. As such, defense counsel was not obligated to object to the prosecutor’s allegedly improper statements. Therefore, defendant suffered no prejudice as a result of the lack of objections nor was she denied the effective assistance of counsel.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens